Supreme Court, U. S.
FILED
SEP 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Respondents.

No. 76-528

CONSUMERS POWER COMPANY,

Petitioner,

v.

NELSON AESCHLIMAN, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE NON-FEDERAL RESPONDENTS IN NO. 76-528

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BRIEF FOR THE NON-FEDERAL RESPONDENTS IN NO. 76-528

Introduction: A Point Of Clarification

We must begin by setting the record straight. Evidently recognizing that its position in *this* case[1] is weak, petitioner Consumers Power Company ("Consumers") tries to confuse matters by harping insistently on *another* case—the "fuel cycle" case, No. 76-419—and indulging in dire predictions of the death knell of nuclear power in the United States.

That is seriously inaccurate. It is true that the Court of Appeals decided the "fuel cycle" case on the same day as *Midland*, and that the two are consolidated here. But it is *not* true that the outcome of the "fuel cycle" case is necessarily dispositive in *Midland*. Although the Court of Appeals' 20-page decision in *Midland* (J.A. 89-111) notes in a single brief paragraph (J.A. 109) that its "fuel cycle" decision applies to *Midland* as well, the Court of Appeals reversed and remanded the *Midland* construction license grant on several *independent*, *non*-"fuel cycle" grounds.

Thus the "fuel cycle" case has only tangential significance here. To be sure, the "fuel cycle" ruling is important, and we believe it should be affirmed by this Court. If it is affirmed, then the decision remanding *Midland* to the Commission must likewise be affirmed. No one has questioned the correctness of the Court of Appeals' holding (J.A. 39 & n. 17) that only a *valid* "fuel cycle" rule could justify the Commission's adamant refusal to consider "fuel cycle" matters in *Midland*. But even if the "fuel cycle" ruling of the Court of Appeals is reversed, the *Midland* remand was based not only on the

[1] Hereafter referred to, consistently with the other briefs in these cases, as *Midland*. The Joint Appendix in this case and the "fuel cycle" case is cited herein: "J.A."

"fuel cycle" issue, but also on other entirely independent (and quite sufficient) grounds. Only if *all* of the Court of Appeals' holdings in *Midland* were wrong could reversal of that court's *Midland* remand be justified.

That also shows the complete inaccuracy of Consumers' claims that this case somehow signals the death knell of nuclear power. In the first place, neither the "fuel cycle" ruling nor the rulings in *Midland* have had any such effect. Even though both rulings have been in effect for more than a year, they have not prevented the Commission from continuing to license nuclear plants. In fact, the Court of Appeals' rulings have, to date, not even halted construction (in *Midland*) or operation (in *Vermont Yankee*) of the specific nuclear plants with which they dealt. As the Government points out, moreover (Br. at 37 n. 36), the Commission is actively engaged in developing a new "fuel cycle" rule; six months ago it promulgated an "interim" rule. 42 F.R. 13803 (Mar. 14, 1977). Thus no unseemly hiatus in licensing will result.

Consumers' "death knell" argument also seriously misstates what is at issue in this case. The fact is that this case, like many other administrative law cases, involves a particular individual record riddled with error as a result of the Commission's refusal to consider important safety and environmental issues. It is by no means an assault on the entire Commission licensing process, although Consumers attempts to make it so; in fact, this case is so unlikely to put a crimp in the nuclear licensing process that the Government originally opposed the grant of certiorari, and even now (Br. at 12) regards the issues in this case as "secondary." While the Court of Appeals' decision in *Midland* will undoubtedly assist in ensuring sound decision-making at the Commission level, then, not even the Government is prepared to give that decision the grandiose implications Consumers sees in it.

QUESTIONS PRESENTED

The questions presented in *Midland* (No. 76-528) are:

1. *Before* the Final Environmental Statement in *Midland* was prepared and environmental hearings held: (i) the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, had for two years required consideration of alternatives which might partially obviate need for the proposed project, even if the agency involved has no direct power to implement them; (ii) the Commission itself had told Congress that energy conservation alternatives to building nuclear plants are legitimate issues under NEPA; and (iii) Intervenors had specifically challenged the failure of the draft Environmental Statement to consider (or even mention) energy conservation and demand-reducing alternatives. Nevertheless, the Commission refused to consider those alternatives, as "beyond our province." Did the Court of Appeals err in holding that the Commission's refusal violated NEPA?

2. The Advisory Committee on Reactor Safeguards (ACRS) is required by law to report publicly on the safety aspects of proposed nuclear plants before the plants can be licensed. After describing several safety-related reactor design problems, the ACRS' *Midland* Report commented, without explanation, that unspecified "other problems" existed and should be "resolved during construction," adding that the Midland plant could be operated without "undue risk" *if* "due consideration" were given to the unidentified "other problems." Did the Court of Appeals err in directing the Commission to obtain clarification of those statements, so that the safety issues could be fully considered?

3. Did the Court of Appeals err in directing the Commission, on remand, to "restrike the [NEPA] cost-benefit analysis, as necessary" and take into account in so doing (in addition to energy conservation alternatives) "waste disposal and other unaddressed fuel cycle issues" as well as materially changed circumstances undercutting the viability of the Midland nuclear project?

STATEMENT OF THE CASE

A. The Importance Of The Midland Public Hearings.

Before turning to the pertinent facts concerning the issues in this case, we must briefly correct Consumers' (and the Government's) claim that, because of its asserted length and thoroughness, the informal, pre-public hearing review of Consumers' license application by the Commission Staff, Consumers, and the ACRS is an important part of the factual background here. That claim is erroneous. In its proper context, including two major facts which Consumers and the Government omit, the *Midland* pre-hearing review—if it is relevant at all—simply emphasizes the importance of the public hearing required by statute.

First, by its very nature the *Midland* pre-hearing review was no substitute for the full and thorough public hearing mandated—even in uncontested cases, see 10 C.F.R. § 2.104(b)(2)—by 42 U.S.C. § 2239. The public did not, nor could it, participate in that review in any way. The participants in the review were Consumers, the Commission Staff, and the ACRS; public participation or even comment was neither sought nor entertained. Thus the public hearing was the only way to insure that the Commission would hear *all* points of view,

and take *all* of the relevant facts into account, in deciding whether or not to grant Consumers' application.

Second, in *Midland* as in most cases (see 10 C.F.R. § 2.104), the public hearing was not scheduled until after the Commission Staff, as a result of the informal pre-hearing review, had decided to support the license application. The *Midland* notice of hearing so stated. 35 F.R. 16750 (Oct. 29, 1970). The public hearing provided the only forum in which that tentative conclusion could be fully tested, questioned, and explored. Rather than downgrading the importance of insuring as full and balanced an analysis of the issues as possible during the public hearing, the pre-hearing review thus reinforced the need for that thoroughness, because (as one of the Commission's Appeal Boards recently conceded):

> "There is a natural reluctance upon the part of decision makers to depart from even tentative prior conclusions unless compelled to do so."

Potomac Electric Power Co. (Douglas Point Station Units 1 & 2), ALAB-277, 1 N.R.C. 539, 552 (1975).[2]

However long it lasted, then, the informal pre-hearing review in *Midland* did not make the statutory public hearing any less crucial. If anything, the pre-hearing review added to the importance of making certain that all relevant issues were thoroughly considered at the hearing.

[2] We might also note that at the time of the *Midland* pre-hearing review the Commission and its Staff were required by statute (42 U.S.C. §§ 2012, 2013) to perform the inherently conflicting jobs of both *promoting* the private peacetime uses of nuclear power, and *regulating* from a public interest and safety standpoint the very activity they were ordered to promote. In fact, it was that "basic conflict between the AEC's regulation of the nuclear power industry and its development and promotion of new technology for the industry" which led Congress to split those functions, by dividing the Commission into separate agencies, in the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* See S. Rep. No. 93-980, U.S. Code Cong. & Adm. News, 93d Cong., 2d Sess. (1974) 5470, 5471.

B. The Commission's Foreclosure Of Issues During The Public Hearings In Midland.

1. The Commission's Refusal To Consider Energy Conservation.

Long before the May-June, 1972 *Midland* environmental hearings, President Nixon had emphatically written "energy conservation," including the need both to "conserve resources" and to "reduce wasteful consumption of energy," into national policy. See, *e.g.*, 117 Cong. Rec. 18049, 18052 (June 4, 1971); 118 Cong. Rec. 3140-42 (Feb. 8, 1972). See also 119 Cong. Rec. 13081, 13085 (April 18, 1973), reaffirming the importance of developing "means to limit future growth in energy demand" and urging "a national energy conservation ethic."

The Commission itself agreed. In August, 1971, its Chairman announced that the Commission intended "to be responsive to the concerns of conservation and environmental groups" in nuclear licensing; he added two months later that energy conservation was a "legitimate" and "not unreasonable" issue, and long before the *Midland* environmental hearings the Commission acknowledged that "the desirability and the means of limiting . . . [demand] growth are being debated today." *Effect of Calvert Cliffs And Other Court Decisions Upon Nuclear Power In The United States*, Report to Senate Comm. on Int. & Ins. Affairs, No. 92-28, 92d Cong., 2d Sess. (Comm. Print 1972) 24; *Selected Materials On The Calvert Cliffs Decision, Its Origin And Aftermath*, Joint Comm. on Atomic Energy, 92d Cong., 1st Sess. (Comm. Print 1972) 397; *Joint Hearings On The Operation Of The National Environmental Policy Act*, Senate Comms. on Pub. Works and Int. & Ins. Affairs, 92d Cong., 2d Sess. (1972) 202. In March, 1972—two months before the *Midland* environmental hearings

began—the Commission told Congress that AEC Licensing Boards had the "authority and responsibility" to consider every aspect of a NEPA cost-benefit analysis, including "the rationing or limiting the use of electricity as an alternative to building a particular nuclear power plant," and then-Chairman Schlesinger again stressed the need to "pay very careful attention" to energy efficiency, better insulating techniques, and other ways to reduce "the demand for electricity." *Hearings On The Calvert Cliffs Court Decision*, Part II, Senate Comm. on Int. & Ins. Affairs, 92d Cong., 1st Sess. (1971) 398, 406; *Joint Hearings*, *supra*, at 104. And the Commission agreed with the Council on Environmental Quality and the Environmental Protection Agency that NEPA required it to consider the alternative of not building a nuclear plant—*i.e.*, of using energy conservation measures to reduce an asserted need for power, rather than automatically assuming that the need must be met through more plant construction—in evaluating license applications. *Joint Hearings*, *supra*, at 405-09. Nor, all three agencies agreed, was consideration of that alternative to be limited to conservation measures the Commission itself could enforce. *Id.*, citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

The Commission also knew, long before the *Midland* environmental hearings, that it could not impose on Intervenors the burden of raising issues such as energy conservation. In December, 1971, some six months after the Court of Appeals' decision in *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), the General Counsel of the Council on Environmental Quality wrote to several Federal agencies, including the Commission, to call their attention to certain of NEPA's requirements. Among them were the agency's obligation

to research environmental impacts on its own, and to take the initiative in considering environmental issues rather than waiting for others to raise the subject. *Hearings On The Calvert Cliffs Court Decision*, Part II, Senate Comm. on Int. & Ins. Affairs, 92d Cong., 1st Sess. (1971) 394-97. And *Calvert Cliffs* itself had made the point clear to the Commission in no uncertain terms (449 F.2d at 1119):

> "NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the Staff's evaluation and recommendation."

In addition, Intervenors had carefully and specifically raised energy conservation issues in their *Midland* Environmental Contentions, filed substantially before the Staff's Final Environmental Statement was prepared. For example, Intervenors sharply challenged the accuracy of the electrical demand projections on which the asserted need for the Midland Plant was based. Intervenors pointed out that the demand projections completely failed to consider:

> ". . . the possibility that rate structures will be revised so as to make large use of electricity on a per unit basis more expensive, thereby discouraging the increased use of electricity."

Contention 88, J.A. 1384; see also Contention 49, J.A. 1367-68. Contention 88 also noted that demand projections for major Consumers customers like General Motors were "inordinately high" in light of "the national movement to conserve energy." Intervenors attacked

Consumers' complete failure to analyze "the need to conserve energy resources" (Contention 85, J.A. 1383). Intervenors asserted that neither Consumers nor the Commission had even attempted to consider energy conservation measures (Contention 73, J.A. 1378-79):

> "A simple arithmetic extension of the present demand curve . . . makes it clear that in a very short period of time our economy will not be able to meet such a demand [for electricity]. There has been a failure to do any analysis as to means to create a *decrease* in demand for electricity or an elimination or curtailment of industrial and other uses of electricity which could be decreased or eliminated so the economy does not suffer in terms of goods and services."

And Intervenors directly and specifically challenged Consumers' failure to take existing energy conservation programs into account in asserting that there was a need for the Midland project (Contention 81, J.A. 1382):

> "Applicant's projection [of demand] assumes a continued growth and development of industry in the State of Michigan. Applicant has not adequately assessed the fact that there is a national and statewide conservation movement which may severely inhibit increases in industry. Applicant also has not considered the possibility that industry in Michigan will seek to expand elsewhere and, thus, not be available to support an alleged increase in demand."

Nevertheless, the Final Environmental Statement continued to ignore energy conservation, and both the Licensing Board (J.A. 207) and the Appeal Board (J.A. 306), at the specific urging of the Commission Staff (R. 16963), rejected Intervenors' energy conservation arguments as "beyond our province" and "beyond the pale of

what we view as required by NEPA."[3] In view of the Commission's later ruling professing an inability to comprehend Intervenors' contentions on the subject (J.A. 324-45), it must be stressed that *neither the Licensing Board nor the Appeal Board indicated the slightest doubt as to what Intervenors' contentions were, or the least bit of difficulty in understanding them.*

Now as in 1971, of course, energy conservation remains "the cornerstone of the National Energy Policy," *The National Energy Plan*, Executive Office of the President, Energy Policy and Planning (1977) 28, and the Commission has long since abandoned its view that "the subject of energy conservation must be altogether ruled out of licensing proceedings." *Niagara Mohawk Power Corp.* (Nine Mile Point, Unit No. 2), 6

[3] The Appeal Board claimed (J.A. 306) that "most" of Intervenors' Environmental Contentions "were in fact considered by the [Licensing] Board." But it did *not* include in its list of those contentions any reference to "a program to conserve electricity," even though it specifically (J.A. 305) identified such a program as among Intervenors' contentions. The Appeal Board also asserted that "the alternative of not building the plant at all is inherently part of the cost-benefit analysis which was carried out by the [Licensing] Board," J.A. 306. But the Licensing Board specifically *refused* to consider energy conservation possibilities in determining whether there was a need for the plant—and, *having thus decided not to question the need for the plant*, had little difficulty in concluding that the need could not be met without building the plant. Paragraphs 49 and 70 of the Licensing Board's decision (J.A. 208, 216) show the syllogism. The Board began by "accept[ing] the need and the 'benefit' of satisfying that need," so that—as the Board admitted—the outcome of the cost-benefit analysis was "practically a foregone conclusion." Having decided that, the Board went on to frame its discussion of alternatives in terms of the *assumptions* that a need for the plant existed and had to be satisfied by building a power plant: "*Assuming that the power needs are to be met*, are there better alternatives?" It was those very assumptions which Intervenors' energy conservation contentions sought to challenge—and into which, regardless of whether it "noted" Intervenors' contentions or "invited . . . brief[ing]" on them (Gov't Br. at 20 n. 18), the Board ultimately refused to permit inquiry.

A.E.C. 995 (1973). And just as Intervenors predicted (see, *e.g.*, J.A. 1382), energy conservation has called into serious question the need for the *Midland* project. See pages 18-19, below.

2. The ACRS Report And The Safety Issues.

The Advisory Committee on Reactor Safeguards (ACRS), which is required by statute to report to the Commission on the safety aspects of a license proposal (42 U.S.C. §§ 2039, 2232(b); 10 C.F.R. § 2.743(g)), played a major role in the pre-hearing review of Consumers' *Midland* application. As the Government tells us (Gov't Br. at 67), the ACRS is a vital source of "expert technical advice to supplement [the Commission's] own understanding and the work of [the] Staff." Its *Midland* Report was not only a mandatory part of the hearing record, 10 C.F.R. § 2.743(g), but also was used in preparing the Staff's Safety Evaluation (see R. 2515 at 81-82, 88-92), another basic part of the hearing documents relied upon by the Licensing Board. See, *e.g.*, J.A. 191-92, 197-98.

In fact, Licensing Boards must not only "review and become familiar with" the ACRS Report before the hearing begins, 10 C.F.R., Part 2, App. A, ¶ I(f) (1972), but "are instructed to rely on the ACRS review unless an ACRS item is contested." *Tennessee Valley Authority* (Hartsville Nuclear Plant), LBP-77-28, 5 N.R.C. 1081, 1119 (1977). And the ACRS Report has, according to the staff of the Joint Committee on Atomic Energy, an "important decisional influence on applications for reactors"—so much so that the Atomic Industrial Forum, an industry group, told the Joint Committee that "the advice of the ACRS . . . amounts to a determination that a license will or will not issue." *Improving the AEC Regulatory Process*, Joint Comm. on Atomic Energy (Comm. Print 1961), Vol. 1, 21-22, 48-49; *Views*

and Comments on Improving the AEC Regulatory Process, Joint Comm. on Atomic Energy (Comm. Print 1961) 7, 9. See also *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1073 n. 5 (D.C. Cir. 1974).

At the time of the *Midland* hearings, however, ACRS meetings were shrouded in secrecy. Only the ACRS' conclusions, as embodied in its Report, were made public. In *Midland*, those conclusions were less than clear. After identifying several safety-related reactor design problems and suggesting appropriate design changes, the ACRS' *Midland* Report added (R. 2615-16):

> "*Other problems* related to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports. The Committee believes that *resolution of these items should apply equally to the Midland Plant* Units 1 & 2.
>
> "The Committee believes that the above items can be *resolved during construction* and that, *if due consideration is given to these items*, the nuclear units proposed for the Midland Plant can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public." [Emphasis added.]

Nowhere did the Report identify the "other problems" or explain the italicized language.[4] Although Intervenors pointed out that the Report's obscurity meant that important safety and NEPA issues were left unexamined, unspecified, and unresolved, all of Intervenors' efforts to flesh out the "other problems" language were rejected. See J.A. 186 n. 2, 275-78.

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[4] The Government (Br. at 71-72) asserts that the ACRS later identified the "other problems." Even if that were correct, the Government admits that the supposed "identification" did not occur until *after* the Licensing Board's decision. Nor was the post-decision letter enough: even today, after yet a second such letter, the ACRS' Report remains unintelligible. See pp. 20-21, *infra*.

The Court of Appeals held (J.A. 107-08) that the *Midland* ACRS Report did not fulfill its statutory function of promoting a "full, free, and frank" public discussion of safety factors related to the Midland project. To the contrary, the opacity of the Report prevented Intervenors from fully exploring safety issues at the *Midland* hearings. Although the Court of Appeals hoped that the Report was at least intelligible to the Commission and the Staff (J.A. 107-08), the Staff has since admitted that the Report left it, as well as everyone else, in the dark. See pp. 20-21, *infra*.

3. The Dow Chemical Company Issue.

Everyone has known from the beginning that the involvement of Dow Chemical Company in the Midland project is not only crucial to the project's economic success but also its sole environmental *raison d'etre*. The Final Environmental Impact Statement (R. 17355 at XI-3), with which the Licensing Board agreed (J.A. 185, 206), is quite blunt:

> "If [Consumers] were not to supply process steam to the Dow Chemical Co., one unit of the Midland Nuclear Power Plant would be cancelled and consideration would be given to transferring the other unit to a different site, probably the existing Palisades site."

Consumers concedes, in fact, that the project would be "uneconomical" without Dow.

In early 1974, however, while this case was pending before the Court of Appeals, Consumers and Dow completely renegotiated their Midland contracts. Although the original contracts had required Dow to purchase *all* of its Midland electric and steam needs from the proposed nuclear plant, under the new contracts Dow is committed to purchase *no* electricity from the plant

other than as "auxiliary or standby" to Dow's own generating facilities. Similarly, under the renegotiated contracts Dow is obligated to purchase only 2,000,000 lbs./hr. of steam from the Midland Plant—less than half the amount on which the original cost-benefit analysis, both by the Licensing Board (J.A. 185, 206) and in the Final EIS, was based. Furthermore, although the Licensing Board (J.A. 206, 218) and the EIS (R. 17355 at XI-10) regarded the closing of Dow's fossil-fuel facilities as a "major benefit" from the Midland project, under the renegotiated contracts Dow is not required to close down those facilities. See R. 24350, 25718, 25731.

Intervenors called those developments to the Commission's attention, asking that the record be reopened to consider whether the new developments (coupled with the fact that the estimated costs of the Midland plant had more than tripled since the cost-benefit analysis had originally been performed) required complete restriking of the cost-benefit analysis. The Commission twice summarily refused to reopen the case. J.A. 346-47, 348-49. After Intervenors pointed out to the Court of Appeals that the Commission had acted without even looking at the new contracts, the Commission—*sua sponte*, without notice, and assertedly because Dow had taken the "unusual step" of withdrawing from the case—did reopen the case, to the extent of obtaining and reviewing the contracts. It declined to take further action, however (J.A. 350-51), on the curious ground (p. 45 of its Brief in the Court of Appeals) that "the closing of Dow's plant was not a determinative factor in its cost-benefit analysis."

After holding that *Midland* must be remanded to the Commission for consideration of the energy conservation and ACRS issues discussed above and for "appropriate consideration of waste disposal and other unaddressed fuel cycle issues" (see J.A. 109), the Court of Appeals

told the Commission to consider the drastic changes in the Consumers-Dow relationship as well (J.A. 109):

> "As this matter requires remand and reopening of the issues of energy conservation alternatives as well as recalculation of costs and benefits, we assume that the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities."

During the Commission hearings conducted after the Court of Appeals' remand, substantial evidence concerning the Dow-Consumers relationship has been heard. Once again, it has shown that Intervenors', and the Court of Appeals', concerns were amply justified. See pp. 22-24, *infra*.

4. The "Fuel Cycle" Issues, As They Pertain To Midland.

The facts pertaining to the Commission's "fuel cycle" rulemaking (the subject of No. 76-419) have only a tangential bearing on *Midland*, as explained at pp. 2-3, *supra*. Because of that and because those facts are fully discussed in the Brief (which we adopt) of respondent Natural Resources Defense Council in No. 76-419, we do not detail those facts here.

That is not to say, however, that the nuclear fuel cycle itself is unimportant in *Midland*. In both economic and environmental terms, the significance of the fuel cycle in *Midland* is apparent from the large amounts of waste the plant will produce. *Each year*, the Midland plant will spew forth 4,200 cubic feet of solid radioactive waste (12 to 15 truckloads, or 3 to 5 rail carloads), 20,000 gallons of liquid waste (6 truckloads, or 3 rail carloads), and waste fuel at the rate of 60 fuel elements —each element containing "large amounts [we are not told how much] of fission products and some plutonium." Final Environmental Statement (R. 17355) at III-42, 43. Those figures should be multiplied by 34 years (the estimated useful life of the plant) to determine Midland's overall contribution to the nuclear waste problem.

Despite their importance, "fuel cycle" issues have never been considered in *Midland*. Although Intervenors directly raised those issues, including those dealt with by the "fuel cycle" rule involved in No. 76-419, as part of their Environmental Contentions in *Midland* (see Contentions 17-27, J.A. 1348-55), both the Licensing Board and the Appeal Board rejected them out of hand on the somewhat contradictory grounds that: (a) the issues were "remote and speculative" since (as the Final EIS admits, R. 17355 at III-42, 43) no one knows what to do about nuclear waste disposal, and (b) nevertheless, the Commission was dealing with those very issues in the then-pending rulemaking (not completed until over a year later). J.A. 173-83, 205-06, 311.

C. The Hearings Before The Commission Following The Court Of Appeals' Remand.

Although both Consumers and the Government acknowledge that the Commission has been far from idle following the Court of Appeals' *Midland* decision, neither explains what has happened before the Commission. An explanation is essential, however, because the post-remand hearings have emphasized the correctness of the Court of Appeals' *Midland* decision as to every point at issue in this Court. Quite simply, if the Commission had permitted exploration of the issues during the original *Midland* hearings, this case might be unnecessary; far from procedural nitpicking, the court's ruling dealt with issues the facts have shown to be vital to the Midland project.

Following the Court of Appeals' decision, the Commission reconvened a Licensing Board for the purpose of considering whether the *Midland* construction permits should be suspended pending full consideration of the issues remanded by the Court of Appeals.[5] Hearings on the suspension issue began last November, and ended in mid-May 1977, having in the interim yielded considerable information concerning the energy conservation, ACRS, and Dow Chemical Company issues remanded by the Court of Appeals. Because the facts elicited during the 1976-77 hearings[6] strongly support the Court of Appeals' rulings on those issues, we shall briefly summarize the facts here.

1. The Energy Conservation Issue.

Even before the suspension hearings were held, Consumers had admitted to the Commission that, just as Intervenors had predicted (see J.A. 1382), the demand projections on which the Commission had relied in *Midland* were seriously exaggerated "*because of energy conservation;*" in consequence, Consumers dropped entirely plans

[5] At first, the Commission limited the suspension hearings to the "fuel cycle" issue. *General Statement of Policy*, 41 F.R. 34707, 34709 (Aug. 16, 1976). Three months later it reversed itself, ordering the suspension hearings to take into account all issues remanded by the Court of Appeals *except* the "fuel cycle" issue (concerning which it anticipated promulgating an "interim" rule). *Consumers Power Co.* (Midland Plant, Units 1 & 2), CLI-76-19, NRCI-76/11, 474 (1976). After the interim rule was announced, 42 F.R. 13803 (Mar. 14, 1977), the Commission added the "fuel cycle" issue to the others, subject, however, to the terms of the interim rule. *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-396, 5 N.R.C. 1141 (1977).

[6] For convenience, reference to the record in the suspension hearings will be in the form "1977 Hrgs.," followed by the transcript or exhibit reference.

to construct another nuclear plant.[7] Consumers' testimony during the *Midland* suspension hearings has further established that large components of Consumers' demand—for example, residential space heating demand—actually *declined* during 1974 and 1975, as Intervenors predicted might occur if rates went up (Environmental Contention No. 88, J.A. 1384), and has proved that most of Intervenors' other energy conservation contentions were correct. Just as Intervenors suggested (Environmental Contention No. 81, J.A. 1382), for example, both industrial and population growth in Michigan are now expected to remain at a standstill for the foreseeable future. And, again just as Intervenors suggested (Environmental Contention No. 89, J.A. 1384), it appears that Consumers' failure to consider energy conservation has resulted in serious overestimates of electricity sales to General Motors, a major component of Consumers' industrial load. 1977 Hrgs., Tr. 1896-97, 1979, 1981, 1983-84, 2000-01, 2004, 2006, 3322-23; Midland Intervenors' Exhibits 22, 36. In fact, just as this Brief was completed, Consumers revised its demand projections downward yet again—including a drop of 38.5% in its projected demand for 1979.[8]

[7] *Consumers Power Co.*, (Quanicassee Units 1 & 2), Dkts. 50-475, 50-476, Applicant's Petition to Withdraw Notice of Hearing (May 9, 1974) 2-5. The full text of the Petition is Exhibit A to Intervenors' Reply Brief in the Court of Appeals. See Intervenors' Environmental Contention No. 77 (J.A. 1380), pointing out that even before the initial *Midland* environmental hearings, Consumers had dropped plans to construct a different plant for similar reasons.

[8] By order dated September 23, 1977, the reconvened Licensing Board declined to suspend the *Midland* construction permits. It recognized that "there are substantial equities favoring . . . suspension", admitted that Intervenors had demonstrated "the weakness of the original NEPA review and the weakness of the original ACRS letter," and conceded that

(Footnote continued on following page)

2. The ACRS Issue.

As soon as the suspension hearings began to give the ACRS issue the kind of scrutiny Intervenors sought, but the Commission refused, during the original hearings, it became apparent that the opacity of the ACRS *Midland* Report was worse even than the Court of Appeals had thought. Although the court had hoped that the Report at least gave the Commission (if no one else) the "benefit of ACRS members' technical expertise" (J.A. 108), Staff testimony quickly established that the Report was as unenlightening to the Staff as it was to Intervenors. The Staff witness who testified on the subject at the 1977 hearings frankly admitted that he had no idea whether the ACRS' "other problems" should—or even *can*—be "resolved during construction;" to the contrary, he speculated that "the plant in fact could go through its entire lifetime with some of these items still being held in a resolution pending category." 1977 Hrgs. Tr. 4220. Nor had the Staff witness any idea of what the ACRS

[8] *continued*
continued construction would increasingly foreclose alternatives to the project and render a fair cost-benefit analysis more difficult. Nevertheless, the Board held that it was powerless to act, because of the amounts Consumers has already spent. (The Board was uncertain enough of its lack of power, however, to *sua sponte* refer its ruling to the Appeal Board.) By considering Consumers' "sunk costs," what the Board has done is to reward Consumers' stalling (and the Commission's refusal to follow NEPA the first time around). Using Consumers' post-construction permit expenditures to justify still further expenditures, despite the impropriety of the original construction permit grant (and despite the Board's finding that Consumers had attempted to conceal vital information, see pp. 23-24, *infra*), means that anyone who can delay NEPA compliance for long enough will thereby be excused from complying with NEPA at all. It means that an illegal course of conduct, if sufficiently persistent, becomes unredressable and unreviewable. That is not the law. See J.A. 109-10 n. 20; *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1084 n. 37 (D.C. Cir. 1974).

meant by its admonition (on compliance with which its finding of safety was predicated) that "due consideration" must be given to the "other problems." After offering a guess that only a good-faith stab at the problems was required, he again confessed ignorance: "I do not know the standards that the ACRS applies to it, no." 1977 Hrgs., Tr. 4219. And even though he conceded that solving (or trying to solve) the "other problems" could be so expensive as to have a significant impact on the ultimate NEPA cost-benefit analysis for the Midland project, the Staff witness testified that he had no idea what the overall cost might be. 1977 Hrgs., Tr. 4259-61, 4265-66. These admissions of ignorance, it may be noted, were made even though the Staff had the benefit of a supplemental ACRS Report, purportedly prepared to comply with the Court of Appeals' ruling.[9]

In short, the *Midland* ACRS Report has left even the Commission Staff in the dark as to what the ACRS' "other problems" are, whether they *must* be resolved in order to assure safety, whether they *can* be resolved, *how* they should be resolved, and *how much* "resolution" (or "due consideration," whatever that means) will cost. Thus both safety and NEPA issues continue to hang fire, awaiting some explanation of what the ACRS has in mind.

[9] On November 18, 1976, the ACRS responded to a request of the reconvened Licensing Board for a supplemental Report. The Staff testimony quoted in the text was given several months later. Although the Licensing Board specifically found the supplemental Report unclear and unsatisfactory and so advised the ACRS (with a request for further information), by letter of March 16, 1977 the ACRS refused to respond further. The Board has not yet decided what action to take concerning the ACRS' recalcitrance. (This, of course, shows that the Government's reliance, Br. at 71, on the ACRS' much earlier additional letter is misplaced. The Staff's ignorance was not clarified by that letter, any more than by the supplemental Report.)

3. The Dow Chemical Company Issue.

During the suspension hearings, both the President of Dow Chemical U.S.A. and the General Manager of its Michigan Division (responsible, until his recent promotion to membership on the operating board of Dow U.S.A., for matters involving Consumers) testified at length concerning the deteriorating Dow-Consumers relationship. That deterioration, which was the chief cause of the drastic 1974 revision in the Dow-Consumers contracts which Intervenors previously called to the Commission's attention, has worsened steadily. Both the President of Dow U.S.A. and the General Manager of its Michigan Division testified, during the suspension hearings, that: (i) the economic advantages of the Midland project to Dow have become marginal, if not nonexistent; (ii) Dow has no confidence at all in Consumers' management ability, ability to finance completion of the Midland project, cost estimates for the project, or estimated schedule for the project; (iii) *if Dow were today given the option of entering into the same contract with Consumers, Dow would refuse to do so;* and (iv) Dow is actively considering as a "realistic option" complete withdrawal from the Midland project, and suit against Consumers, on the ground of breaches of contract by Consumers. Both men also testified that Dow's *pro forma* support for the Midland project is at best reluctant (and heavily influenced by Consumers' threats of multi-million dollar litigation, which Dow's house counsel termed "pretty damn close to blackmail"), and could vanish entirely in the event of "any significant change that might take place from the current conditions—that could include almost anything." 1977 Hrgs., Tr. 323, 405-09, 2288-91, 2297-2301, 2311-12, 2322, 2432, 2505-07, 2516, 2522-24, 2690, 2699, 2707-12, 2723-24, 2730; Midland Intervenors' Exhibit 25.

Of extreme importance, in view of the extent to which the regulatory process depends on the candor of utilities like Consumers, is the revelation (and Board finding) that Consumers and its counsel attempted "cover-up" tactics at the suspension hearings. According to notes of meetings with Consumers produced by Dow at the suspension hearings, Consumers told Dow before the hearings that it wished to "finesse [the] Dow-Consumers continuing dispute" by having Dow tender a witness unaware of the facts. 1977 Hrgs., Tr. 2399-2400, 2703; Midland Intervenors' Exhibit 25. When Dow refused, Consumers undertook to draft the written testimony of the Dow witness, Mr. Temple. 1977 Hrgs., Midland Intervenors' Exhibit 60A, items A1, B; Tr. 2379-80. On cross-examination, Mr. Temple agreed that the written testimony was "not open, not honest, and not consisting of all the relevant information." 1977 Hrgs., Tr. 2307, 2379-82[10]

In its recent Order on the suspension issues (see p. 19, n. 8, *supra*), the Licensing Board concluded that whether Dow will ever buy steam from the Midland plant "is, on the record, *speculative*," and if Dow does not buy steam from the Midland plant "the circumstance will be one of a plant at a site for which only very limited alternatives were explored, designed in substantial part for a purpose which will not be ful-

[10] Although Consumers says that this Court need not concern itself with the Dow issue because the Commission has authority to consider the issue regardless of this Court's ruling (Br. at 17, 47), Consumers has taken a directly contrary approach before the Commission. Before the Commission, Consumers has repeatedly argued that the Commission can consider only the precise issues remanded by the Court of Appeals, and even as to those issues can consider only the particular point or points specified by the Court of Appeals. In particular, Consumers told the Commission, in its June 13, 1977 Brief on the suspension issue, that the Commission is powerless to look beyond the bare fact that contracts between Dow and Consumers exist.

filled." The Board also concluded that, although the attempt of Consumers and its counsel to suppress information concerning the Dow dispute apparently failed (because of Intervenors' "aggressive" participation[11]), "there remains the suspicion, raised by the disclosure of these instances [of concealment], that there may have been similar ploys which were successful."

4. The "Fuel Cycle" Issues, As they Pertain To Midland.

As the Court of Appeals explained in its "fuel cycle" opinion (J.A. 39-40 n. 17), the "fuel cycle" ruling affects *Midland* primarily because the exclusion of all "fuel cycle" matters from license proceedings—including *Midland*—was invalid given the invalidity of the rule on which that exclusion was based. Pending promulgation of a new and valid rule, then, "fuel cycle" matters must be dealt with in individual license proceedings. Accordingly, in its *Midland* opinion the court ordered that "fuel cycle" issues be given "appropriate consideration" on remand. J.A. 109.

That has not yet been done. Although initially leaving "fuel cycle" issues open for consideration in the suspension hearings, shortly after the hearings began the Commission removed those issues from the hearing in anticipation of a new "interim" rule. By the time the rule was promulgated and the issues once again opened for consideration, the suspension hearings were virtually over; the "fuel cycle" issues have not yet been dealt with. See p. 18, n. 5, *supra*.

But the "fuel cycle" aspect of *Midland* remains significant, in economic as well as environmental terms. The cost of nuclear fuel for the Midland plant is an important component of its overall economic feasibility, as Dow's Mr. Temple testified at the suspension hearings (1977 Hrgs., Tr. 2419-22), and one which has been consistently escalating. Even during the post-remand period, Consumers has raised its nuclear fuel cost estimates more than once (see 1977 Hrgs., Tr. 3781-85), and the Commission Staff has asserted (in its Proposed Findings on the suspension issue) that "[i]t is uncertain whether Dow would again conclude that the Midland Plant is economically preferred if the revised nuclear fuel cost data were used."

[11] And *not*, we note, because of any information uncovered by the Staff in the pre-hearing discussions so heavily relied on by Consumers and the Government. See pp. 5-6, *supra*.

In addition, although the availability of plutonium recycling was assumed in the original Midland hearings (and in both the new "interim" fuel cycle rule and its invalid predecessor), the Administration has now officially opposed recycling. As Consumers has recognized, that will further escalate the net cost of nuclear fuel. In testimony submitted by Consumers to the Michigan Public Service Commission in a still-pending rate proceeding, Consumers has taken the view that in computing nuclear fuel costs the "salvage" value of the fuel—*i.e.*, its post-use value in the event that reprocessing takes place—must now be assumed to be zero.[12]

It will be observed that in each instance the facts, as they have developed, tend to bear out both the claims made by Intervenors as to the issues foreclosed by the Commission and the importance of those issues to the ultimate decision about the Midland project.

[12] Michigan Public Service Commission Dkts. Nos. U-4840, U-4621, prepared testimony of Ronald L. Hikes (Jan. 6, 1977).

SUMMARY OF ARGUMENT

While *Midland* is by no means the arena in which the future of nuclear power will be decided, the issues it presents are extremely important in the context of the Midland project itself. They are linked by a common thread: in each instance, the Commission refused to consider or explore issues it is mandated by statute to address before licensing nuclear plants, and in each instance the Commission's refusal to explore the issues has seriously impaired the accuracy of its ultimate conclusions. In fact, in each instance the Commission has in one way or another subsequently admitted that it was wrong.

I

As to the energy conservation issues which were barred by the Commission, for example, the Commission itself has long since admitted that NEPA requires exactly what it refused to do in *Midland*—and requires it, moreover, to do so completely without regard to whether Intervenors raise the issue. The Commission's excuses for not doing in *Midland* what it admits it must do in every other case are lame at best. Its claim that energy conservation was a subject so novel when *Midland* was heard as to require Intervenors directly to present it (and in fact to prove that each of their suggestions would obviate the need for the Midland project, as a prerequisite to the Commission's consideration of them) is factually false as well as directly contrary to the fundamental thrust of NEPA. Long before the environmental hearings in *Midland*, energy conservation was a crucial part of national energy policy, and the Commission itself had advised Congress that it was well aware of that fact and of its duty to consider energy conservation in licensing nuclear plants.

In fact, the Commission's "hindsight" argument is no more than an avoidance by afterthought. Neither the Licensing Board nor the Appeal Board, which rejected Intervenors' energy conservation contentions as "beyond our province," claimed inability to understand the contentions or unfamiliarity with their basic subject matter. The "threshold test" imposed by the Commission did not surface until more than a year later, as a *post hoc* rationalization for the Commission's refusal to direct the Boards to do what they should have done in the first place. The Government's accusation that the Court of Appeals imposed "hindsight" on the Commission, then, is both inaccurate and spurious. The Court of Appeals told the Commission nothing that the Commission did not already know.

Equally spurious is the claim that Intervenors did not adequately raise energy conservation issues. To begin with, they were not required to raise those issues at all as a prerequisite to Commission consideration; NEPA imposes the obligation to "consider and give effect to" environmental factors "to the fullest extent possible" *on the Commission*, not on Intervenors. That also is no surprise to the Commission, which had announced its acceptance of that principle more than a year before the *Midland* environmental hearings. Furthermore, Intervenors did raise energy conservation issues in a manner sufficient forcefully to apprise the Commission of their presence in the case and their potential significance. The Commission's contrary argument is inaccurate insofar as it claims that Intervenors did not do enough, and in flat derogation of NEPA insofar as it claims that Intervenors should have done more. Especially in light of the Government's own emphasis on the length and scope of the Commission's pre-hearing

study of the Midland project, it is ridiculous to claim that the Commission was unable to unearth and consider the necessary energy conservation information unless Intervenors led it by the hand.

Nor is energy conservation a peripheral issue in *Midland*. The Commission admits that energy conservation, by virtue of NEPA, is not a peripheral issue in *any* case, and that is underscored by the primacy of energy conservation, both in 1971 and today, as the "cornerstone" of national energy policy. In *Midland*, moreover, events have proved the accuracy of nearly all of Intervenors' energy conservation contentions. Far from supporting the Government's attempt to brush off the subject as unimportant, that reinforces the conclusion—obvious from NEPA and the Commission's own admission—that the Commission should have done initially precisely what it is now doing, under the prodding of the Court of Appeals' decision.

II

The same is true of the ACRS Report. The Commission Staff has now admitted not only that it finds the Report incomprehensible (a point supported by a recent Licensing Board decision in another case), but also that unveiling the Report's obscurities is essential for purposes of the NEPA cost-benefit analysis in *Midland*, as well as in order to conduct the "full, free, and frank" discussion of safety hazards mandated by Congress. And it has been clear from the beginning that the vagueness of the ACRS Report prevented exploration of safety issues at the *Midland* hearings, even though that exploration is one of the principal purposes of the hearings.

In light of the Staff's admissions, it will not do to claim that the ACRS Report does not matter, or that it is a side issue. Even without those admissions, the ACRS Report is clearly not the mere public relations gimmick

the Commission branded it in attempting to foreclose safety issues from consideration. Thus the problem is not whether the Report fell short of its purpose; clearly it did. The problem is how best to remedy the defect. The Court of Appeals adopted the least possible remedy, one which the Government admits the Commission has itself employed on other occasions. While the Court could and should have done more, there can be no quarrel with the propriety of the remedy it chose.

III

Finally, the propriety of the Court of Appeals' remand of the Dow and "fuel cycle" issues cannot seriously be doubted. As to the Dow issue, the Commission itself admitted the importance of the changes in the Dow-Consumers relationship (and the error of its earlier refusal to consider the changes at all) by reopening the record and reviewing the new Dow-Consumers contracts. Nothing in this Court's decisions, let alone in NEPA's requirement—acknowledged by the Commission—that reassessment of costs and benefits be conducted in light of changing facts, justifies the Commission's refusal to go further, particularly inasmuch as the basis for that refusal (its claim that the Dow relationship was unimportant) is directly contradicted by both the Environmental Impact Statement and the Licensing Board's decision.

Whatever might be the case if the Dow issue were the only reason for requiring the Commission to restrike its cost-benefit balance, since the Commission's other errors required such a restriking in any event it would be sheer stultification to exclude the changed Dow facts from that reassessment. And the same is true of the fuel cycle issue. Whether or not that issue will in the end be determinative of the Midland project's economic or environmental propriety is not the point (though the importance of the issue should not be minimized, in light of

the peculiar facts of *Midland*). The point is that the issue has never been examined in *Midland*, so that we have no way of knowing how important it is. A valid rule might offer an adequate means of factoring fuel cycle issues into individual cases without the need for case-by-case analysis. But an *invalid* rule—as the Court of Appeals determined the "fuel cycle" rule to be—obviously cannot. No one quarrels with the Court of Appeals' conclusion that until a valid rule is adopted, "appropriate consideration" must be given to fuel cycle issues on a case-by-case basis. That has not yet been done in *Midland;* in fact, although the pending rulemaking was the basis for the Commission's refusal to consider fuel cycle issues in *Midland*, not even the rule itself was considered in *Midland*. It was not adopted until more than a year after the *Midland* record was closed.

Overall, then, the consequence of the Commission's foreclosure of issues in *Midland* was a decision which neither took the required "hard look" at the relevant issues nor rested on "a consideration of the relevant factors." The Court of Appeals quite properly told the Commission to reexamine that decision.

ARGUMENT

As is obvious from the facts and as the Government (Br. at 12) tacitly concedes by branding them "secondary," the issues in *Midland* involve neither the future of nuclear power nor any threat to the Commission's licensing activities. They involve only the Commission's refusal, in defiance of specific statutory commands, to consider specific safety and environmental issues in the

context of a particular license proceeding. That the Commission's actions were narrow, as well as unjustifiable, appears from the fact that it has either expressly or implicitly admitted error in each instance. See pp. 32-33, 39, 49, 56, *infra*.

While the issues dealt with by the Court of Appeals in *Midland* do not have the cosmic implications ascribed to them by Consumers, however, they are of unmistakable importance in terms of the Midland project itself, and the Commission's actions run squarely counter to fundamental principles of administrative law. By throttling at its inception the development of an adequate record on these issues, the Commission not only prevented the full and fair public hearing to which Intervenors were entitled and which Congress commanded even in uncontested cases, but threatened to subvert the informed judicial review without which ". . . *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962). Particularly in light of the facts which have come to light now that the Commission *has* begun to deal with the issues, this case emphasizes the wisdom of this Court's comment in *Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1963):

> "Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring."

That is the focus of the discussion which follows. It is unremarkable, perhaps; the books are full of decisions like that of the Court of Appeals, holding that agencies cannot arbitrarily bar or truncate inquiry into relevant

subjects. Rhetoric aside, the Court of Appeals' decision simply applied those settled principles. Certainly it does not remotely signal the "death knell" of nuclear power. To the contrary, by fostering the "full, free, and frank" public hearings mandated by Congress, the Court of Appeals has if anything aided the nuclear cause. Public acceptance of nuclear plants is far more likely to occur when the public knows that the issues have genuinely been explored than when—as here—the hearings result in a series of important but completely unexamined questions.

I.

THE COURT OF APPEALS CORRECTLY HELD—AS THE COMMISSION HAS SINCE ADMITTED—THAT THE COMMISSION'S REFUSAL TO CONSIDER ENERGY CONSERVATION ISSUES WAS IMPROPER.

Consumers and the Government cannot, of course, defend on the merits the Commission's refusal to consider energy conservation alternatives in *Midland*. Well before the Licensing Board's decision, the President had written energy conservation into national policy, and the Commission itself had agreed that energy conservation was among the proper subjects of its NEPA inquiry. It knew, moreover, that its duty to consider energy conservation did not depend on whether Intervenors raised the issue, *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1119 (D.C. Cir. 1971), nor upon whether it had any direct power to implement conservation measures. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1973); see pp. 8-9, *supra*. Not long after *Midland*, in fact, the Commission abandoned its attempt to bar conservation "at the threshold." *Niagara Mohawk Power Corp.* (Nine Mile Point, Unit 2), 6 A.E.C. 995 (1973). Well before *Niagara Mohawk*, the

Federal Power Commission had reached the same conclusion, 38 F.R. 15944, 15949 (June 18, 1973); as early as three months before the *Midland* Licensing Board decision, the FPC had affirmatively emphasized the importance of energy conservation measures in power licensing, and specifically stressed many of the same points Intervenors made in their energy conservation contentions. 37 F.R. 20045-46 (Sept. 23, 1972).

In the face of all that, Consumers and the Government wisely do not try to defend the undefendable. Instead, they engage in confession and avoidance. While they recognize that the Commission is obligated not only to consider energy conservation, but to do so on its own initiative regardless of whether Intervenors raise the subject, see J.A. 344, Consumers and the Government try to excuse the Commission's refusal to do so here on two fictitious grounds. The first is the claim that energy conservation is such a new subject as to have been outside NEPA's purview when *Midland* was decided; allied to that is the claim that the Commission was justified in applying its tardy *Niagara Mohawk* recognition of its NEPA obligations prospectively only. The second is the claim that Intervenors did not adequately raise energy conservation contentions.

A. The "Hindsight" Argument Is Wholly Spurious And Factually False.

To begin with, the "hindsight" argument is the worst sort of "*post hoc* rationalization," and should not be taken seriously at all. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). At no time did the Licensing Board or the Appeal Board assert that energy conservation was a novel subject the parameters of which they did not understand. They did not even

claim that energy conservation was unimportant. They simply said that it was, *as a matter of law, not a proper contention* under NEPA: "beyond our province" in the words of the Licensing Board, and "beyond the pale of what we view as required by NEPA" in the words of the Appeal Board. J.A. 207, 306. The "hindsight" argument, in fact, did not surface until the Commission's attempt, more than a year after the Licensing Board's decision, to defend its refusal to reopen the environmental record, in the teeth of *Niagara Mohawk*, on the ground that energy conservation was "a novel and evolving concept." J.A. 344. Especially in light of its factual inaccuracy, discussed below, the "hindsight" argument is manifestly an excuse, not a reason, and one which limps lamely after the fact.[13]

More important, however, is the fact that the "hindsight" claim is simply wrong. We showed at pages 7-9, *supra*, that long before the Licensing Board's decision, the Commission itself had advised Congress that energy conservation was not only comprehensible but an eminently proper subject of inquiry in licensing proceedings, and that President Nixon had repeatedly stressed the importance of energy conservation as a matter of national policy. Also before the Licensing

[13] The "hindsight" argument also contradicts the Commission's claim (J.A. 341) that Intervenors' energy conservation contentions were in fact considered by the Licensing Board. Although that claim is completely erroneous (see page 11 n. 3, *supra*) and was quite correctly rejected by the Court of Appeals after thorough review of the record (J.A. 95, 103), that it was made at all underscores the fact that energy conservation was far from the arcane mystery Consumers and the Government now depict. One can hardly consider on the merits a concept one cannot comprehend. Even though quite mistaken, then, the claim that the Licensing Board did consider energy conservation on the merits shows both that the Board knew perfectly well what energy conservation means and that Intervenors had adequately called the Board's attention to that subject.

Board's *Midland* decision, a report to the Senate Committee responsible for NEPA had reached the same conclusion:

> "Probably the most extreme alternative to be considered [under NEPA] for [nuclear] power plants is that demand for electricity be curbed rather than build additional capacity."

Effect of Calvert Cliffs And Other Court Decisions Upon Nuclear Power in the United States, Report to Senate Comm. on Int. & Ins. Affairs, No. 92-28, 92nd Cong., 2nd Sess. (1972) 51. And we have already pointed out that the FPC found energy conservation perfectly understandable, and a required part of its own NEPA analyses, long before the Commission's "novel and evolving concept" claim professed its inability to cope with the subject. Indeed, case law had also emphasized the matter well in advance of the Licensing Board's decision; see *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972), which the Commission had promised faithfully to follow in statements to Congress before the *Midland* environmental hearings even began. *Joint Hearings*, *supra* p. 7, at 409.

Thus, the "hindsight" argument is a complete sham. It is also directly contrary to the fundamental purpose of NEPA. The object of NEPA was to *avoid* lurching from crisis to crisis, belatedly waking up to fuel shortages and destroyed resources only after the crunch has become unavoidable:

> "The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects and alternatives to particular agency action involves some degree of forecasting. . . . It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known."

Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 1097 (D.C. Cir. 1973). In light of the President's repeated emphasis on energy conservation as a matter of national policy and the affirmative NEPA requirement that *all* alternatives to environmental damage be considered "to the fullest extent possible" *before* an "irreversible and irretrievable commitment of resources" has been made, 42 U.S.C. § 4332, it is impossible to take seriously the claim that energy conservation alternatives were "beyond the pale of . . . NEPA" when *Midland* was decided.

B. The Commission Had No Right To Apply Niagara Mohawk "Prospectively Only".

What we have just seen also disposes of the claim that the Commission was entitled to apply *Niagara Mohawk* prospectively only. On the face of it, that simply puts a premium on precisely the delay and "foot-dragging" roundly (and correctly) condemned by the Court of Appeals in *Calvert Cliffs Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1117 (D.C. Cir. 1971). It means that the Commission can ignore NEPA until compelled to obey (as it did prior to *Calvert Cliffs*), and that if it is alert enough to see the judicial compulsion on the horizon and act accordingly, it may immunize the effects of its delay from correction. That, after all, is what happened in *Niagara Mohawk*. As the Commission itself admitted, that ruling was prompted by the impending decision in *Ecology Action v. AEC*, 492 F.2d 998 (2nd Cir. 1974) (a fact also recognized by the Second Circuit, 492 F.2d at 1002 n. 4); even so, it was not forthcoming until after it had been required by the explicit Guidelines of the Council on Environmental Quality, 40 C.F.R. § 1500.8 (a)(4) (August 1, 1973).

The Commission's own attempted justifications for its "prospective only" ruling (J.A. 337) cannot, of course, overcome NEPA's commands—especially in light of *Calvert Cliffs*, where the Commission unsuccessfully made the same arguments for the same purpose. It is absurd to claim that the Commission's tardy recognition of its NEPA obligations authorized it to avoid fulfilling them for all prior cases. Whatever may be the case as to obligations an agency imposes upon itself, here NEPA, not the Commission, imposed the obligation. The Commission had no more authority coyly to condition its compliance with NEPA in the *Niagara Mohawk* context than it did in the context of the events leading up to *Calvert Cliffs*.

It is worth pointing out, however, that the Commission's justifications do not hold water. That it may be "burdensome" to consider energy conservation in *Midland* has no more significance than did the equally great "inconvenience" of reopening *Midland* in order to permit compliance with *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1129 (D.C. Cir. 1971)—wherein the Court of Appeals emphasized that NEPA's command to comply "to the fullest extent possible. . .does not provide an escape hatch for foot-dragging agencies" and "does not make NEPA's procedural requirements somehow 'discretionary'." To the contrary, "considerations of administrative difficulty, delay and economic cost will not suffice" to justify agency failure to comply with the statutory mandate. Here as in *Calvert Cliffs*, the Commission's argument from "inconvenience" is an excuse, not a reason—and an utterly insufficient excuse at that.

Nor is there any "governmental interest" in avoiding full application of NEPA. To the contrary, NEPA itself, 42 U.S.C. § 4331(b), establishes as the "continuing responsibility" of the federal government, through the

use of "all practicable means," the ongoing recognition and implementation of environmental goals. Section 11 of the Guidelines of the Council on Environmental Quality, adopted long before *Midland*, agrees, and squarely requires an ongoing process of improvement, implementation and re-evaluation of environmental considerations. (See 36 F.R. 7724, 7729, Apr. 23, 1971). As the Sixth Circuit held in *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1176 (6th Cir. 1972):

> "Congress' intent concerning the applicability of NEPA to ongoing federal projects is most clearly stated in § 101(b), by the terms of which it is apparent that the Congress envisaged *ongoing agency attempts to minimize harm* caused by the implementation of agency programs. This would accomplish not only *constant re-evaluations of projects already begun* to determine whether alterations can be made in existing features *or whether there are alternatives to proceeding with the projects as initially planned*, but also the consideration of the environmental impact of all proposed agency action." [Emphasis added.]

The "governmental interest" applicable here, then, is in applying NEPA—not in continuing the Commission's penchant, rejected in *Calvert Cliffs*, *supra*, of looking for ways to avoid its application. Here as in *Calvert Cliffs*, moreover, that "governmental interest" gains added force from the fact that any administrative inconvenience inherent in applying *Niagara Mohawk* to this case is purely and simply the result of "foot-dragging" by the Commission. The principles reluctantly recognized in *Niagara Mohawk* should have been applied to this case from the beginning. That the Commission's recognition of that fact was belated can hardly be used to justify still further delay in implementing that recognition. Any other result would encourage the very "foot-dragging" to which the Commission has been prone in NEPA matters, and would affirmatively

reward the Commission's tactic of delaying for as long as possible its implementation of what NEPA plainly requires.

C. Even Though They Were Not Obligated To Do So, Intervenors Directly Raised Energy Conservation Issues.

First. As a matter of law, Intervenors were not obliged to raise energy conservation issues at all as a prerequisite to the Commission's performance of its NEPA obligations. Those obligations do not depend upon, nor do they stop at, the preparation of an EIS alone. Rather, they require an agency to "consider" and "give effect to" NEPA's environmental goals, not merely to "fill archives" with impact statements. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 298 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). Furthermore, the Commission's attempt to avoid environmental issues unless Intervenors affirmatively raised them was squarely addressed and rejected in *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971), and we have pointed out previously that no alleged "novelty" warranted any different result as to energy conservation issues. To the contrary, *Midland* was by no means the Commission's first encounter with the subject of energy conservation. See pp. 7-9, 34-35, *supra*.

The Government admits, in fact, that at least after *Niagara Mohawk* "it was. . .the responsibility of the applicant, the Staff, and the Board to assure that the record on energy conservation issues is adequate *whether or not intervenors raise those issues.*" Gov't Br. at 26. But, as we have previously explained (see pp. 36-38, *supra*), *Niagara Mohawk* did not amend NEPA, nor alter in the least degree the Commission's NEPA

obligations. It merely—and belatedly—recognized what those obligations were.

The entire argument over whether Intervenors adequately raised energy conservation issues, then, is really beside the point. The Commission had no more right to condition its analysis of energy conservation on whether Intervenors raised the issue than it did to refuse to consider energy conservation at all. In addition, the claim that Intervenors did not adequately raise energy conservation issues like the Commission's convenient "threshold test," is nothing but another *post hoc* rationalization, seized upon long after the fact. The Licensing Board and the Appeal Board did *not*, as we have previously explained (see pp. 10-11, *supra*), reject Intervenors' contentions as incomprehensible. At the express urging of the Staff (R. 16963), they rejected Intervenors' contentions—just as other Boards were doing in other cases, *e.g.*, *Wisconsin Electric Power Co.*, ALAB-137, 6 A.E.C. 491, 497-98 (1973); *Long Island Lighting Co.*, ALAB-156, 6 A.E.C. 831, 852 (1973)—*on the theory that they were barred as a matter of law.* The Commission's "threshold test," like its "hindsight" argument, is thus as specious, *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962), as it is an improper abdication of the Commission's NEPA responsibility to "take the initiative." *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1119 (D.C. Cir. 1971); see also *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965).

Indeed, the Commission itself seems implicitly to concede that fact. It is significant that the "threshold test" rationale for refusing to consider energy conservation in *Midland* has not been used in other cases. Even in the context of environmental contentions made (and environmental impact statements prepared) well before *Niagara Mohawk*, the Commission has not found any

such test necessary. See, *e.g.*, *Northern States Power Co.*, LBP-74-17, 7 A.E.C. 487, 492 (1974), holding any such test improper: "That the obligations imposed upon the agency by NEPA do not depend upon the case sought to be made by an intervening party cannot be seriously disputed."

Second. Furthermore, the Commission's good-for-this-day-and-train-only "threshold test," even though concocted exclusively for *Midland*, would fail to justify the Commission's *post hoc* ruling even if it were valid. The ineluctable fact is that in *Midland* the Commission was *not* obliged to exercise its imagination, or even to "take the initiative," *Calvert Cliffs' Coord. Comm. v. AEC*, 449 F.2d 1109, 1119 (D.C. Cir. 1971), in considering energy conservation issues. We do not believe extended argument is necessary to show that Intervenors adequately presented their energy conservation contentions. Those contentions (see generally J.A. 1378-85) are described at pp. 9-10, *supra*. At a minimum, they make it clear that Intervenors attacked both the accuracy of Consumers' demand estimates (which failed to take existing energy conservation programs into account) and the adequacy of the NEPA review of the Midland project (which also failed to examine whether additional energy conservation techniques—as opposed to building more power plants—might wholly or partially offset any asserted need for more power). Consumers certainly knew what Intervenors were driving at: contemporaneously with the *Midland* environmental hearings, the Michigan Public Service Commission, which has jurisdiction over Consumers, was conducting a massive inquiry into energy conservation techniques and possibilities, including "curtailing the irrational promotion of load growth," utility rate restructuring, and improving energy efficiency. *Energy Conservation And S. 2176*,

Part II, Senate Comm. on Int. & Ins. Affairs, 93d Cong., 1st Sess. (1973) 913, 918-19. Many of the same questions Intervenors raised were also part of that inquiry—just as they were of the Federal Power Commission's similar inquiry. See 37 F.R. 20045-46 (Sept. 23, 1972).

Intervenors were not, then, presenting bizarre issues.[14] To the contrary, they were making points which were already part of the working vocabulary of other State and Federal "energy agencies"—and, we submit, of the Commission as well. As previously noted, neither the Licensing Board nor the Appeal Board expressed any difficulty in understanding what Intervenors had in mind, and the Court of Appeals correctly held (J.A. 93-94, 102) that Intervenors had "forcefully pointed out" the inadequacies of the Environmental Impact Statement drafted by the Commission Staff in a manner "adequate to 'stimulate the Commission's consideration' of energy conservation alternatives." Indeed, Intervenors' energy conservation contentions closely paralleled those *upheld* by the Commission in *Niagara Mohawk*. See Supp. R. 25112 at 7-15.

Far from abandoning the "rule of reason" developed by its own decisions, then, the Court of Appeals—as its opinion carefully explains, J.A. 100-102—applied well

[14] Consumers (Br. at 26) finds "vague" Intervenors' reference to means of generating electricity "not now known to man." But its own load growth estimates include such demand-increasing factors as "the invention of new electricity-using appliances . . . that are not yet envisioned." 1977 Hrgs., Tr. 1959. As for Intervenors' reference to "social stimuli," Consumers Br. at 26, see *Energy Conservation And S. 2176*, *supra*, at 915 (comments of a member of the Michigan Public Service Commission about "outdated attitudes" and "policy assumptions").

settled principles in holding Intervenors' contentions sufficiently clear to merit consideration. It held only that the Commission could not, as it sought to do (see J.A. 97-100, 332), compel Intervenors, as a prerequisite to even being permitted to raise the issue, to *prove* both that energy conservation alternatives were feasible and that they would *entirely* obviate the need for the project under discussion. That was correct. Both the Council on Environmental Quality and the courts had emphatically held—long before the Commission invented its "threshold test"—that NEPA imposes no such limitation. *Hearings on the Calvert Cliffs Court Decision*, Part II, Senate Comm. on Int. & Ins. Affairs, 92d Cong., 1st Sess. (1971) 394-97; *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109, 1119 (D.C. Cir. 1971); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

D. As The Commission Recognized In Niagara Mohawk, Consideration Of Energy Conservation Alternatives, Like Other NEPA Alternatives, Is Part Of Its Mandate.

A final point must be made. Supported by a few of the *amici curiae*, the Government hints (Br. at 55-56) that energy conservation issues should not be considered because the Atomic Energy Act does not empower the Commission to ask whether a nuclear plant is needed before licensing it.[15] In effect, that questions whether

[15] See the Brief for *amici curiae* Hans A. Bethe, *et al.*, in No. 76-528. A related claim is raised by the U.S. Labor Party as *amicus curiae* in No. 76-528: that NEPA is unconstitutional because it derogates from the "commitment to scientific and technological progress" found in the Constitution. We do not believe that that argument requires response.

NEPA applies to the Commission at all, since the consideration of need is a vital part of the overall examination of alternatives (including the alternative of not proceeding with the project) required by NEPA and by the Guidelines of the Council on Environmental Quality, 40 C.F.R. § 1500.8(a)(4).

While the issue is not properly before this Court, having not been addressed in the petitions for certiorari, and also is foreclosed by the Commission's own *Niagara Mohawk* decision, it should be mentioned that NEPA's chief Congressional sponsor made it clear that NEPA was intended to foreclose precisely the "no mandate" argument now tendered: "No agency will be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions." See *Calvert Cliffs' Coord. Comm., Inc., v. AEC*, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971). By establishing the goal of preserving our environment and requiring agencies to "consider and give effect to" that goal, see 42 U.S.C. § 4332(2)(A), (2)(B), and by mandating that, "to the fullest extent possible," Federal law be "interpreted and administered in accordance with" that goal, 42 U.S.C. § 4332(1), Congress enshrined in the mandate of each Federal agency the affirmative duty to consider environmental protection. As NEPA itself provides, 42 U.S.C. § 4335, that duty is supplementary and in addition to the existing authority of Federal agencies, not subordinate to limitations on that authority "implied" from the fact that the governing statute happens not to mention environmental matters.

In fact, the States who are the chief alleged beneficiaries of the "no mandate" argument themselves do not agree with it. Twenty-four States—including Michigan, the site of the Midland project—have joined as *amici curiae* here, urging *affirmance* of the Court of

Appeals' rulings in *Midland* as well as in the "fuel cycle" case. Their Brief emphatically states (at p. 8 n. 12) that:

> ". . . energy conservation is an alternative to licensing which must be actively considered by responsible federal officials prior to final decisions on proposed energy related actions."

And they reiterate (at pp. 4, 27) the same point we are making here (and which has special force in *Midland* as unfolding events attest to the accuracy of Intervenors' energy conservation contentions): that if the benefits of proceeding with a nuclear project like *Midland* do not outweigh its costs, environmental and otherwise, "it is far better that we discover that now" rather than waiting until the damage has become irreparable. The facts we now know underscore the correctness of the Court of Appeals' ruling, as a means of avoiding what the States properly term (at p. 4) "hasty or otherwise irrational decisions based on incomplete assessments of all the true costs of and alternatives to proposed licensing actions."

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE MIDLAND ACRS REPORT WAS FATALLY FLAWED—A FACT WITH SERIOUS NEPA, AS WELL AS SAFETY, IMPLICATIONS.

Before the Commission, Intervenors had not only challenged the adequacy of the cryptic ACRS Report, and its reference to unidentified "other problems" which should be given "due consideration" if the Midland plant was to be safe (see pp. 13-14, *supra*), but had sought discovery from the ACRS concerning the meaning and basis of the Report. Although the Licensing Board argued at one point that discovery would be improper

(because the ACRS was not a "party") and would impair "informal communication of views" during the pre-hearing Staff-Consumers-ACRS review process, its primary ground for denying discovery—and the sole ground for the Appeal Board's affirmance—was that the ACRS Report is essentially a public relations gimmick having no substantive significance. J.A. 186 n. 2, 275-78. As the Appeal Board put it (J.A. 275):

> "The ACRS letter is only admitted as part of the record to show compliance with statutory requirements and not for the truth of any of the statements therein."

It is on that curious proposition that the following discussion focuses, since that was the ground on which the Commission relied. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given. . . ." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). While we also address the argument that discovery would be inappropriate or burdensome, we believe that to be a subsidiary point, It does not excuse the ambiguity and obscurity of the ACRS Report; rather, it goes only to the question of what remedy is appropriate. And in any case it is largely a *post hoc* rationalization entitled to little weight. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962).

A. The ACRS Report Is Far More Than A Public Relations Gimmick. It Has Substantial Significance, As To Both Safety And Environmental Issues.

It will not do blandly to announce that the ACRS is a meaningless body whose statutorily required review has no significance and whose statutorily required report has no meaning. We saw at pp. 12-13, *supra*, that the ACRS played a major role in the review, and its Report

a major role in the approval, of the Midland project. Even the Government, moreover, admits that the Commission "needs" the ACRS as a source of "independent expert technical advice to supplement its own understanding and the work of its Staff" (Br. at 67), and Congress obviously thought no less highly of the ACRS when it required not only that the ACRS report on each reactor but that the reports be made public.[16] Far from filling a minor public relations function, the ACRS Report was intended by Congress to bring out in the open all possible safety problems besetting a nuclear reactor in order to promote public discussion:

> "Having established the [ACRS] . . ., it was thought that its functions would be best served if its reports should be made public, and if the facilities of the type on which its report were required should be licensed only after a public hearing.
>
> "The Joint Committee concluded that *full, free and frank discussion in public of the hazards involved* in any particular reactor would seem to be the most certain way of assuring *that the reactors will indeed be safe* and that the public will be fully apprised of this fact." [Emphasis added.]

S. Rep. No. 296, U.S. Code Cong. & Adm. News, 85th Cong., 1st Sess. (1957) 1803, 1813-14. Indeed, the object of the exercise was to prevent the licensing of reactors not found safe by the ACRS. See *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1073 n. 5, 1075 n. 13

[16] In fact, the Government all but disavows the "no-substantive-significance" argument on which the Commission relied, preferring instead to argue—erroneously, as shown at pp. 12-13, *supra*, and in the text, *infra*—that Congress did not have "public evaluation of the basis for the ACRS position" in mind when it enacted 42 U.S.C. § 2232(b). Gov't Br. at 69. But that begs the question. In *Midland*, as the Commission Staff has now admitted, it is not only the basis for the ACRS' position, but *the position itself*, which is obscure. And if the ACRS' findings are in fact a part of the Commission's substantive consideration, it is all the more important (to the integrity of the Commission's decision and the mandatory public hearings, as well as to Intervenors' ability to deal with safety issues) that the findings and their basis be clear.

(D.C. Cir. 1974). Deliberately conferring upon the ACRS what amounts to a veto power over reactor licensing hardly signifies an intent to deprive its Reports of substantive meaning.

The Commission's attempt to downgrade the ACRS Report in *Midland*—and in other cases, see *Arkansas Power & Light Co.*, ALAB-94, 6 AEC 25 (1973)—is not surprising. The Commission initially opposed the requirement that ACRS reports be made public, S. Rep. No. 296, U.S. Code Cong. & Adm. News, 85th Cong., 1st Sess. (1957) 1803, 1816, and has unsuccessfully tried to repeal the mandatory ACRS review requirement. See *Selected Materials On The Calvert Cliffs Decision, Its Origin And Aftermath*, Joint Comm. on Atomic Energy, 92d Cong., 1st Sess. (Comm. Print 1972) 410 (speech by AEC Chairman). But the Commission's attempt to accomplish by *ipse dixit* what Congress has refused to do cannot be sanctioned.

Quite apart from the legislative history, Commission decisions themselves have made it clear that ACRS reports are not mere public pablum. In this case itself, far from ignoring the substantive significance of the *Midland* ACRS Report, Consumers explicitly argued to the Licensing Board that ACRS findings were so substantively reliable as to warrant a shift in the burden of proof on safety issues (R. 329 at 8-10), and the Staff's *Midland* Safety Evaluation—on which the Licensing Board concededly relied (see, *e.g.*, J.A. 195-98)—explicitly relied in turn upon the ACRS Report. See R. 2515 at pp. 81-82, 88-92, and see *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1078 (D.C. Cir. 1974), correctly noting that the role of the Licensing Board is to "review a record already compiled by the Staff *and the ACRS*, who *have responsibility* for the sufficiency of that record." That echoes the long-standing view of the staff of the Joint Committee on Atomic Energy:

> "The main function of the [license] hearing is to present the combined judgments of the applicant, Staff, *and ACRS* that the proposed reactor is safe." [Emphasis added.]

Improving The AEC Regulatory Process, Joint Comm. on Atomic Energy, 87th Cong., 1st Sess. (Comm. Print 1961), Vol. I, pp. 21-22, 48-49; see also *Id.*, Vol. II, App. 5, p. 141.

Quite recently, moreover, one of the Commission's Licensing Boards held (in an opinion by both of the scientist members of the panel) that cryptic ACRS language identical to that involved here not only defied comprehension—as the Staff has admitted in *Midland*, see pp. 20-21, *supra*—but severely hampered the entire regulatory process, failed to provide "sufficient information to fully understand ACRS intent," and presaged real difficulties at the operating license stage. At that point:

> ". . . the ACRS will review the operating license application and could correct the Staff's interpretation [that "due consideration" did not mean actual resolution of problems] at that distant point in the future, if required. *Yet at that point, the ACRS might have to advise withholding an operating license or modifying a plant that could result in delay if the Staff's interpretation of the ACRS letter is wrong.*" [Emphasis added.]

Tennessee Valley Authority (Hartsville Nuclear Plant), LBP-77-28, 5 N.R.C. 1081, 1118 (1977).

The Board members might well have added that the consequences of a wrong guess are far more serious than delay alone. Suppose, for example, that when (and if) the Midland project reaches the operating license stage, the ACRS announced that its original, but vague, Report contemplated a design modification which should have

been made during construction in order to ensure safe operation. Not only will the huge sums spent during plant construction have *pro tanto* been wasted, but additional sums will have to be spent in order both to tear down what has already been completed and to rebuild it in a proper fashion.

From a safety standpoint, an even more serious possibility—even, perhaps, a likelihood in view of the Commission's admitted "reluctance . . . to depart from even tentative prior conclusions," *Potomac Electric Power Co.* (Douglas Point Stations, Units 1 & 2), ALAB-277, 1 N.R.C. 539, 552 (1975)—is that when the plant reaches the operating license stage, the immense sums already invested in construction will result in a tendency to forego design modifications otherwise desirable, and thus to relax or overlook safety criteria in the interests of economics. As the Appeal Board recently commented in *Midland:*

> "The more that is expended, the less likely it is that, on account of environmental [and, we suggest, safety] considerations, either the cost-benefit balance will be tipped against the plant or potential alternatives will remain feasible."

Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 N.R.C. 772, 779 (1977). That is why it is uniformly conceded that the review at the operating license stage is largely a formality, and that the real decisions are made (as here) during the construction license process. *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076 (D.C. Cir. 1974); see also *Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 412 (1961). In this case itself, in fact, a Consumers witness testified during the post-remand hearings that as construction of the Midland plant continues, safety-related design or construction modifications become increasingly unfeasible. 1977 Hrgs., Tr. 1066-68, 1138.

What is most important, however, is that the fundamental purpose of the ACRS Report is to promote "full, free, and frank" discussion of safety issues in order to "assur[e] that the reactors will indeed be safe"; ACRS' statutory mandate, after all, is to "advise the Commission with respect to the hazards involved at any facility" so that they can be corrected, not so that they can be swept under the rug. S. Rep. No. 296, U.S. Code Cong. & Adm. News, 85th Cong., 1st Sess. (1957) 1803, 1813-14, 1825. That is also one of the major purposes of the mandatory public hearings on construction license applications; see 10 C.F.R. § 2.104(b)(1). It is a far cry from an exercise in public relations—and it is exactly what the cryptic ACRS Report frustrated in *Midland.* The Commission itself has admitted that new "safety issues . . . may be unearthed in connection with the renewed consideration of the ACRS letter" following the Court of Appeals' remand, *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-395, 5 N.R.C. 772, 779 n. 24 (1977), and the Staff has admitted that new cost-benefit concerns may also be presented. See pp. 20-21, *supra.* In view of those admissions, it is absurd to say that the Report can be thrust aside as substantively meaningless. We turn now to the question of how best to remedy the Report's fatal opacity.

B. The Court Of Appeals' Direction To The Commission To Obtain Clarification Of The Midland ACRS Report Was Proper. It Was The Least The Court Could Have Done Under The Circumstances.

> "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it."

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n. 4 (1974). As we saw at pp. 20-21, *supra*, and as the Licensing Board explained in *Tennessee Valley Authority* (Hartsville Nuclear Plant), LBP-77-28, 5 N.R.C. 1081, 1119 (1977), however, the ACRS' opaque *Midland* language fell short of even the Court of Appeals' hope that it gave the Commission "the benefit of ACRS members' technical expertise" (J.A. 108). Certainly it did not tell Intervenors what the facts and issues were, let alone further the Congressionally mandated "full, free, and frank discussion" of those facts and issues. To the contrary, the opacity of the ACRS' *Midland* Report has prevented a full analysis of safety issues *in the license hearings themselves.* The Licensing Boards "are instructed to rely on the ACRS review unless an item is controverted." *Tennessee Valley Authority, supra*, 5 N.R.C. at 1119. But one cannot "controvert"—certainly not with the "particularity" required by 10 C.F.R., Part 2, App. A, ¶ III(a)(1)—what one cannot understand, and it is now admitted that no one, including the Licensing Board and the Commission Staff, understands the ACRS Report.

That the ACRS Report was not fully analyzed during the *Midland* hearings is bad enough; it is intolerable in light of the Staff's admission that it too is at a loss. Under those circumstances, the Court of Appeals acted well within the bounds of propriety when it directed the Commission to obtain clarification from the ACRS—a step, as the Government admits (Br. at 69) to which the Commission itself has resorted on other occasions, and the omission of which in *Midland* was irresponsible in light of the Staff's conceded confusion. In fact, the court could and should have gone farther. Its rejection of Intervenors' argument that discovery from the ACRS should have been permitted, which the

Court of Appeals premised on the "collegial" character of the ACRS and this Court's holding in *United States v. Morgan*, 313 U.S. 409, 422 (1941), evidences an overly tender regard for the ACRS. This Court has long held that due process forbids agencies to immunize facts and issues from scrutiny. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4 (1974), citing *Ohio Bell Telephone Co. v. Public Utility Comm.*, 301 U.S. 292, 300, 302-03 (1937). What Mr. Justice Cardozo wrote for a unanimous court in *Ohio Bell*, 301 U.S. at 302, is directly applicable to the ACRS "other problems" language in this case from both the safety and the environmental cost-benefit analysis standpoints:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that *even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.*" [Emphasis added.]

If "hearings and appeals are to be more than empty form," *Id.* at 303, that must not be permitted. Only by securing some sort of explanation from the ACRS can the meaningful public discussion and resolution of both safety and environmental issues which Congress mandated in the Atomic Energy Act and in NEPA be secured, and only in that way can a reviewing court assure itself that the Commission has "considered all relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

Under those circumstances, as this Court made clear in *Overton Park, supra*, 401 U.S. at 420, nothing in *United States v. Morgan*, 313 U.S. 409 (1941), prevents a court from requiring an administrative body to explain what it means. That is doubly true here, where Congress

explicitly intended that the ACRS Report promote "full, free, and frank" public discussion of safety issues and where exactly the same "action-forcing" requirement of public disclosure of agency thinking lies at the heart of NEPA's procedural requirements. See *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972).

Far from constituting an improper intrusion into the administrative process, then, the Court of Appeals' decision stopped well short of granting Intervenors the full relief to which they were entitled. The court could and should have insisted that the Commission provide reasonable discovery, subject to any necessary safeguards to prevent it from becoming unduly burdensome, into the meaning and bases for the ACRS *Midland* Report. But the court did much less. It simply told the Commission to do here what, as the Government now admits (Br. at 69), *the Commission itself has done on other occasions*—to send the report back to the ACRS for clarification.[17] Under the circumstances, that was the least the court could have done, and was eminently proper.

III.

THE COURT OF APPEALS ACTED PROPERLY IN REMANDING MIDLAND TO THE COMMISSION FOR A RESTRIKING OF THE NEPA COST-BENEFIT ANALYSIS.

In Parts I and II of this Brief we have shown that the Court of Appeals was right in holding that the Commission seriously erred in refusing even to entertain

[17] Given the ACRS' present refusal to comply with the Licensing Board's request for an explanation of its *Midland* Report (see p. 21, n. 9, *supra*), affirmance of the Court of Appeals' ruling also seems necessary in order to help the Commission pursue the very self-devised remedy it has previously used.

(much less consider) energy conservation alternatives to the Midland project on the ground that the whole subject was "beyond our province", and in refusing to seek an explanation of the cryptic ACRS Report.

Standing alone, either of those errors required remand of *Midland* to the Commission. Both errors profoundly impaired the NEPA cost-benefit analysis, by foreclosing consideration of alternatives to (and safety-related design modifications of) the Midland project and by preventing full examination of the cost of coping with added safety problems and its impact on the project. As we have seen, those are by no means trivial matters. See pp. 18-21, *supra*. In addition, the ACRS error also prevented the full discussion and resolution of *Midland* safety issues demanded by Congress—again, far from a minor or secondary matter.

Neither Consumers nor the Government challenges the appropriateness of the Court of Appeals' statement (J.A. 109) that, since a remand was required in any event, on remand the Commission should "take into account the changed circumstances" concerning the Consumers-Dow Chemical Company relationship. To the contrary, Consumers twice assures this Court (Br. 17, 47) that the Commission has ample power to reexamine those circumstances. We add, however, that in the context of this case both NEPA and the Commission's own decisions impose the *obligation* to consider the drastic alterations in the Consumers-Dow relationship described at pages 22-24, *supra*—especially since, as the Licensing Board reaffirmed in its suspension ruling (see pp. 23-24, *supra*) they go to the very heart of the *Midland* project.

That would be true even if the Dow issue were the only reason for restriking the cost-benefit analysis. Whatever might be the case if nothing more than a purely discretionary denial of reconsideration were involved, see *ICC v. Jersey City*, 322 U.S. 503 (1944), here we have more. Here the Commission itself *did* conclude that the Dow issue warranted further consideration, and *did* (albeit grudgingly) reopen the proceeding by demanding and reviewing the renegotiated Dow-Consumers contracts. J.A. 350-51. Nothing in *Jersey City* remotely justifies the Commission, *having made that decision*, to conduct its reopened inquiry wholly *ex parte* and without notice to Intervenors. Nor does *Jersey City* authorize a decision on reconsideration based on inaccurate reasons. Here, however, the Commission concluded that the renegotiated Dow-Consumers contracts were unimportant on the astonishing ground—flatly contradicted by the Environmental Impact Statement and the initial decision of its own Licensing Board (see p. 14, *supra*), and again repudiated by the reconvened Licensing Board (see pp. 23-24, *supra*)—that the closing of Dow's fossil-fuel plant "was not a determinative factor in its cost-benefit analysis." See page 15, *supra*. See also 28 U.S.C. § 2347(c), explicitly authorizing the Courts of Appeals to order the taking of additional evidence by, *inter alia*, the Commission (28 U.S.C. § 2342(4)). The only requirements are that the evidence be "material" and that "reasonable grounds" exist for not having previously offered it—both clearly satisfied with regard to the Dow evidence in *Midland*.

In addition, the "discretion" customarily invoked in discussing requests for reconsideration must, in a case like this one, be considered in light of NEPA. It is well settled that NEPA demands ongoing and continuing efforts at accommodating proposed Federal action to environmental needs, and that not merely an initial

analysis but also "constant reevaluations of projects already begun" must be made "to determine whether alterations can be made . . . or whether there are alternatives to proceeding with the projects as initially planned." *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1176 (6th Cir. 1974); 40 C.F.R. § 1500.13; see also *Hudson River Fishermens' Ass'n v. FPC*, 498 F.2d 827, 832-33 (2d Cir. 1974).

It would make no sense to construct the entire Midland facility absent Dow participation; the Final Environmental Impact Statement explicitly so states, and the reconvened Licensing Board agrees. See pages 23-24, *supra*. But the developing facts suggest that we may have reached precisely that state of affairs, as the reconvened Licensing Board suggested by describing Dow's continued participation as "speculative." See pages 22-24, *supra*. Under those circumstances, the Commission's own decisions, as well as the cases cited above, require a fresh look at the facts. As the Commission held in *Commonwealth Edison Co.*, ALAB-153, 6 A.E.C. 821, 823-24 (1973):

> ". . . [I]t is not proper to resolve a major environmental question on the basis of a set of facts existing in the past if there is good reason to believe that there may have been an appreciable, and material, change in the factual situation."

See also *Consolidated Edison Co.*, ALAB-188, 7 A.E.C. 323, 407 (1974). And when the energy conservation and ACRS issues are added to the Dow issue, the need for a fresh look—on safety as well as environmental grounds—is inescapable.

Thus the Court of Appeals acted properly in remanding *Midland* to the Commission for a fresh look at, and recalculation of, costs and benefits, regardless of wheth-

er its decision in *Vermont Yankee* concerning "fuel cycle" issues independently required such a remand. With regard to both the ACRS issue and the energy conservation issue, the record before the Court of Appeals established beyond cavil that the Commission had *not* taken a "hard look" at those problems, and had *not* considered all the relevant factors. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-36 (D.C. Cir. 1976). And with regard to the Dow issue, the court had no alternative under NEPA but to point out that any recalculation of costs and benefits would be ridiculously incomplete without reexamination of the drastically changed facts concerning the central reason for building Midland in the first place.

While they are thus not controlling here (and are fully discussed in the Brief of respondent Natural Resources Defense Council in No. 76-419, which we adopt), we think it important to make two brief points concerning the "fuel cycle" issues.

To begin with, the Court of Appeals did not overturn the Commission's conclusion that fuel cycle matters are best dealt with in the rulemaking context. To the contrary, the Court of Appeals explicitly found the Commission's preference for the rule-making approach to be acceptable (J.A. 39-40 n. 17). It held only that, since it had found the Commission's rule-making to be deficient *for want of an adequate record* (as the Commission has stated, see 42 F.R. 13803, Mar. 14, 1977[18]), the invalid

[18] See also the Brief of the 24 States as *amici curiae*, at 10-11. Since the United States has believed from the beginning that the "fuel cycle" ruling was based on the inadequacy of the record (Brief for the Federal Respondents in reply to the petitions for certiorari, p. 9), and the Commission now agrees, it is difficult to understand why the Government argues the contrary.

rule-making could no longer serve as a basis upon which to justify a refusal to consider fuel cycle issues in license proceedings.

Far from constituting an unwarranted intrusion into the Commission's deliberative processes, that holding merely states the obvious. No one claims here that the Commission can, consistently with NEPA, ignore outright the serious and unresolved issues posed by the environmental effects of producing, transporting, and storing nuclear waste. But if the attempt to deal with the issues by rule is invalid for want of an adequate record (as the Court of Appeals concluded it was), then, and until a valid rule is promulgated, the issues cannot be excluded from a license proceeding. That is all the Court of Appeals held with respect to the *Midland* "fuel cycle" issues.

Similar problems beset Consumers' argument concerning the rule-making itself. In effect, Consumers would have this Court abandon entirely judicial review of rule-making proceedings, by holding that the courts may not question an agency judgment either concerning the adequacy of the evidence on which the rule is based (Consumers' Br. at 46) or concerning the procedures adopted in the rule-making. But even the Government concedes (Br. 36-37) that consideration of the adequacy of the evidence before the Commission is well within "the established bounds for judicial review of agency action", and is not rendered any less so by "the presence of highly technical and specialized material in the record." And the short answer to the other half of Consumers' attempt to abolish judicial review of rule-making is again provided by the Government. The Government conceded in the Court of Appeals (see J.A. 44) that 5 U.S.C. § 553 does not pretend to announce the

outer limits of rule-making procedural safeguards, and the legislative history the Government quotes here expressly so states (S. Rep. No. 752, 79th Cong., 1st Sess., 14-15 (1945)):

> "This subsection [now 5 U.S.C. § 553(c)] states . . . the *minimum requirements* of public rule-making procedure short of statutory hearing. . . . *Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.*" [Emphasis added.]

Furthermore, the extent to which the Commission's "fuel cycle" rule-making procedures actually assured performance of its plain duty to "consider and give effect to" all pertinent environmental factors, see *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 298 (8th Cir. 1972); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976), was not only a permissible question for the Court of Appeals to consider, but a genuine one in light of its past experience with the Commission. These cases were the court's sixth encounter with the Commission's NEPA activities in the first five years since NEPA's passage—a period marked by the Commission's reluctance to follow NEPA at all unless compelled to do so.[19] And even if the Court did reject the "fuel cycle" rule-making on procedural grounds (see Gov't Br. at 36-37), it adopted an eminently satisfactory method of ensuring that the Commission would do its

[19] The earlier cases are *Calvert Cliffs' Coord. Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); *Scientists' Inst. for Pub. Info., Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Gage v. AEC*, 479 F.2d 1214 (D.C. Cir. 1973); *Union of Concerned Scientists v. AEC*, 499 F.2d 1069 (D.C. Cir. 1974); *Carolina Environmental Study Group v. United States*, 510 F.2d 796 (D.C. Cir. 1973).

job. Rather than engaging in a debate over what procedures would suffice, the court left that determination to the Commission, telling the Commission only to ensure that its procedures would afford "procedural safeguards" appropriate "to prevent erroneous decisions on the merits from occurring." See *Silver v. New York Stock Exchange*, 373 U.S. 341, 366 (1963); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-36, 66-67 (D.C. Cir. 1976). Indeed, the Court of Appeals asked the Commission to do no more than Section 102 of NEPA, 42 U.S.C. § 4332, commands: to provide procedures which of themselves would compel the required "hard look" at environmental concerns. See *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 409, 410 n. 21. That was not error.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in No. 76-528 should be affirmed. Regardless of the outcome of No. 76-419 (which we believe should also be affirmed), the ruling of the Court of Appeals in No. 76-528, remanding *Midland* to the Commission for recalculation of costs and benefits, was correct. As the States point out at page 4 of their *amici curiae* Brief, the Court of Appeals' ruling is no threat to sound administrative decisionmaking. It merely seeks to avoid

what happened in *Midland:* a "hasty" and "irrational"[20] decision "based on incomplete assessments of all the true costs of and alternatives to proposed licensing actions."

Respectfully submitted,

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[20] Part of that "irrationality" flows from arguments (like that suggested by Consumers, Br. at 6 n. 1) that incorrect decisions may be immune from redress, or even review, on the ground that the utility has already begun work on the project. If accepted, that argument reduces the entire judicial review process to an idle ritual. What the Court of Appeals held here is that environmental and safety issues had not been fully evaluated when the *Midland* construction permits were granted. Everyone agrees that a full evaluation of those issues is a prerequisite to a valid permit grant, and the post-remand hearings have shown that such an evaluation uncovers major problems with the project. To say that, although the analysis was not made to begin with, it is now a useless exercise because in the interim Consumers has spent money on the project (funds which may be largely recoverable in any event), is to indulge in economic blackmail—to claim that the law must not be enforced because it would cost too much. To act on that basis would encourage administrative noncompliance with controlling statutes, by advising persons in Consumers' position that if they can only delay long enough (or spend fast enough) their noncompliance will become unreviewable. That is not only fallacious but dangerous, because it suggests that justice can, in practice, be bought. Even if there is a hole in Consumers' pocketbook—a matter best addressed by the Michigan Public Service Commission—it cannot excuse noncompliance with NEPA or the Atomic Energy Act. Affirmance of the Court of Appeals' decision is thus all the more necessary, so that the sort of foreclosure of meaningful judicial review by *fait accompli* in which Consumer has engaged can be given the short shrift it deserves.